Appeal No. UKEAT/0124/12/JOJ

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 7 June 2013
Judgment handed down on 3 June 2014

Before

HIS HONOUR JUDGE SEROTA QC

MS K BILGAN

MR T HAYWOOD

MS S PAPAJAK — APPELLANT

(1) INTELLEGO GROUP LTD
(2) INTELLEGO HOLDINGS PLC
(3) ZENOSIS LTD — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS S PAPAJAK (The Appellant in Person)
For the Respondents	MR M WEST (Representative) Peninsula Business Services Ltd 5th Floor, The Peninsula 2 Cheetham Hill Road Manchester M4 4FB

SUMMARY

PRACTICE AND PROCEDURE

Case management

Bias, misconduct and procedural irregularity

Review

The Claimant brought proceedings which were vigorously contested. She sought to establish that she had suffered an unfair (constructive) dismissal. The hearing was fixed over two days. On the first day the Claimant unsuccessfully sought an adjournment. The Employment Tribunal read the witness statements and pleadings before the hearing commenced.

The Employment Judge gave a Case Management ruling on the order in which witnesses should be called to accommodate a witness travelling from abroad. The Claimant strongly disagreed with the decision of the Employment Judge and left the hearing making it clear she would not return. The Employment Judge advised her that the Employment Tribunal had noted that in order to establish her case the Claimant had to show that her evidence would be accepted rather than that of the Respondent's witnesses. She was advised that if she declined to give evidence she ran the risk of her case being dismissed in her absence. The Claimant refused to stay. The Employment Tribunal went on to consider the case in her absence and dismissed her claims. The Claimant then sought a review of the judgment and requested that the original Employment Judge should not undertake the preliminary consideration of the application of review pursuant to rule 35(3) of the Employment Tribunal Rules of Procedure on the grounds that the Employment Judge was biased. An allegation of bias was wholly without merit and the only complaint against the Employment Judge was that she had made a ruling not to the Claimant's liking. The Employment Judge did not consider that the mechanism of review was appropriate for allegations of bias, she declined to recuse herself and refused an application for a review on the basis that no grounds for her to order the review had been made out; it was not in the interests of justice for the decision to be reviewed.

On appeal the Claimant maintained that by reason of the allegation of bias that it was not "practicable" for the original Employment Judge under the application to have the decision reviewed. The Employment Appeal Tribunal held that, "practicable" meant "feasible" rather than inconvenient and that it was wholly appropriate and sensible for the original Employment Judge to carry out the preliminary consideration of the application as provided for by the rule.

HIS HONOUR JUDGE SEROTA QC

Introduction & procedural chronology

1. This appeal arises out of claims by the Claimant at the time of the hearing and after two Case Management Discussions raised the question of whether the Claimant had been unfairly dismissed (constructive dismissal). Other claims raised by her were not pursued. An ET1 was dated 20 September 2009 but the claim was vigorously disputed.

2. There was an issue as to the correct Respondent and after a letter from the Claimant, the Employment Tribunal on the 28 May 2010 was determined by reason of a TUPE transfer the correct Respondent should be Intellego Group Ltd and Intellego Holdings Plc should be removed as a Respondent.

3. The hearing before the Employment Tribunal was listed for 31 August and 1 September 2010. The presiding Employment Tribunal was Employment Judge Stacey. The Clamant sought an adjournment. On day 2 there was a disagreement of the decision of the Employment Tribunal as to the order in which witnesses should be examined. The Claimant (and her brother who was accompanying and assisting her) elected to leave. The Employment Tribunal went on to consider the claim in her absence and dismissed all claims.

4. On 2 September 2010 the Claimant asked the Employment Tribunal not to give judgment as she was preparing further submissions based on evidence submitted including a 41 page witness statement. On 3 September 2010 the Employment Tribunal judgment was perfected and sent (without Reasons) to the parties on 6 September 2010 and is as follows "The unanimous judgement of the Tribunal is that the Claimant's claim is dismissed". The Reasons for the Tribunal's judgment are dated 22 September 2010 and were sent to the parties on 23 September 2010.

5. On 6 October the Claimant applied for a review. The Claimant wished to have the application for a review listed before an Employment Judge other than Employment Judge Stacey and complained in her letter of 6 October 2010 that Judge Stacey's actions, "have been partial unfair in my case". She accused Employment Judge Stacey and the lay members sitting with her, "To have converged to embrace and visibly supported what could be a tactical decision from the Respondent to restrict exposure of his main witness… The unfair attitude and actions of the panel on that question were not the only issues that occurred during the hearing as a general lack of impartiality of the panel and especially Judge Stacey was noticeable on other matters and proceedings at this hearing as well." It is clear from the terms of the letter and the list of documents provided to support the application for a review that she was seeking a reconsideration of the findings of the Employment Tribunal. Indeed, throughout the hearing before us the Claimant appeared to believe that an application for a review gave her an opportunity for a complete re-hearing of the case. Although in its judgment of 22 September 2010 the Employment Tribunal expressly stated that before coming to its conclusion it had read, "all the statements and documents referred", the Claimant maintained that the Employment Tribunal had not read all of that material.

6. On 13 October 2010 Regional Employment Judge Hildebrand replied to the Claimant. He made clear that by virtue of the Employment Tribunal Rules of Procedure an application for a review of a judgment was subject to preliminary consideration by the Employment Judge who chaired the hearing to determine whether it stood a reasonable chance of success:

> **"There is no mechanism by which I can appoint another Judge to deal with your application for a review of the decision reached by Employment Judge Stacey and members in circumstances where she is available to deal with it."**

7. Judge Hildebrand advised the Claimant that if she were dissatisfied with the outcome of the hearing she could challenge the hearing by virtue of the review process or, alternatively, by an appeal to the Employment Appeal Tribunal. Any complaint of misconduct should be referred to the President of the Employment Tribunal whose address was supplied. Employment Judge Hildebrand clearly had in mind rule 35(3) which provided in terms that the application should be considered, "by the Employment Judge of the Tribunal which made the decision, or if that is not practicable, by…(a) a Regional Employment Judge or the Vice-President."

8. Employment Judge Stacey duly considered the application for a review and concluded that there were no reasonable grounds for the decision to be reviewed. There was no reasonable prospect of the decision being varied or revoked. Accordingly she refused the application for a review. Employment Judge Stacey observed, "A rule that provides for the decision taken to review his or her own decision does not lend itself well to an allegation of bias and impartiality for exactly the reason identified by Ms Papajak: she would have no confidence in my decision if I did not grant her request." Employment Judge Stacey considered that complaints of this nature were not appropriate for the review mechanism but were better dealt with by appeal and she redirected the Claimant to the Employment Appeal Tribunal.

9. On 20 May 2011 the Claimant submitted a Notice of Appeal against the decision to dismiss her case on 3 September 2010, the Notice of Appeal relating only to the decision for the refusing the application for a review. On 14 December 2010 HHJ Peter Clark directed that the Notices of Appeal be disposed of under Employment Tribunal rule 3(7).

10. The Claimant then exercised her right for the matter to be reconsidered under rule 3(10) of the Employment Tribunal Rules of Procedure. The hearing was before HHJ Birtles. The

Claimant had the good fortune to be represented by Ms Sarah Watson of counsel who appeared under the ELAAS Scheme. Ms Watson duly drafted an amended Notice of Appeal, containing three grounds that HHJ Birtles directed should go to a full hearing. The Notice of Appeal in relation to the original decision was dismissed in full but three grounds of the Notice of Appeal relating to the review judgment were sent to a full hearing. The Claimant appealed to the Court of Appeal in relation to those grounds of appeal which had been dismissed. The application was considered and rejected on the papers by Pill LJ. The Claimant requested an oral hearing which was disposed of by Pill LJ on 13 December 2011, when he again refused permission to appeal.

11. So far I have said little about the factual background which I now turn to gleaned from the various papers in our bundle including the decisions of the Employment Tribunal.

12. The Claimant claimed that she had been unfairly dismissed by way of a constructive dismissal. At one time (and this is not material to the appeal) there was some doubt as to who the Claimant's employer was at the material time because her appointment had transferred as a result of a number of insolvencies and TUPE transfers. The Claimant was initially uncertain as to who her employer was at the time of dismissal although it may well be that she had satisfied herself shortly before the hearing. It is not clear if a letter from the Claimant to the Employment Tribunal had been seen by the Employment Judge prior to the hearing relating to the issue about whether there had been a TUPE transfer to the Second Respondent.

13. The Respondents were engaged in learning solutions for the pharmaceutical industry. The Claimant was engaged as a Business Development Manager, apparently by the Third Respondent which at some point in time was placed in administration. The Respondents asserted that the Claimant had been made redundant and had later been recruited by the First

Respondent, the business of which had been acquired by the Second Respondent. The Respondents denied there had been a TUPE transfer. The Claimant's claim included claims for redundancy payments, holiday pay, compensation for having suffered a detriment after making a protected disclosure, compensation for failing to provide her with written terms and conditions, bullying, harassment and for unpaid wages; all the claims were vigorously disputed.

The judgment of the Employment Tribunal.

14. The Employment Tribunal record that the case came before the Tribunal for hearing for four days between 31 August and 3 September 2010. The principal complaint, it was agreed, was one of unfair constructive dismissal and the sole issue for the Employment Tribunal was whether the Claimant had resigned or had been dismissed. The question to be resolved was whether there had been a breach of the implied term of trust and confidence by the Respondent amounted to a repudiatory breach of contract with the Claimant and whether the Claimant left in response to such breach. On the first day of the hearing there were a number of issues raised as to the admissibility of various documents and further disclosure. The Employment Tribunal records at paragraph 9:

> **"The parties agreed that the Tribunal would pre-read the witness statements and spend the remainder of the first day reading the witness statements and the documents referred to so that cross examination could commence on Wednesday 1st September 2010. The consultant from Peninsula Business Services Ltd who appeared for the Respondent, Mr Howe, explained to the Tribunal that his principal witness, Mr Green, no longer worked for the Respondents and was attending business meetings in Copenhagen on 2nd and 3rd September but would be available for cross examination on Wednesday 1st September. Mr Howe asked if Mr Green could be interposed. Two possibilities were canvassed by the Employment Tribunal. Firstly that Mr Green should give his evidence first before cross examination of the Claimant; secondly that the cross examination of the Claimant should commence on 1st September with Mr Green being interposed if necessary during the course of the day. The Employment Tribunal left the parties to consider the option that they preferred and asked them to inform the Tribunal the next day so a decision could be made. The Tribunal spent the rest of the day reading the statements and the documents and considering the applications for specific discovery."**

15. On day two, 2 September 2010, the Tribunal gave its decision in relation to the applications for specific discovery and then went on to discuss the order of proceedings. The

Claimant suggested that she could be cross examined by Mr Howe for two hours and then she (or her brother) could cross examine Mr Green for 2 hours, that she wished her cross examination to commence first. The Tribunal had two concerns. Firstly, having read all the statements and documents referred to it seemed most unlikely that the Claimant's cross examination of Mr Green would conclude within two hours and there would be a risk that her questioning of him would not complete within the time available, if it was to commence after the luncheon adjournment. The second concern of the Employment Tribunal was that it would place the Claimant under unnecessary and undue strain for her to break off her own evidence for the purposes of cross examining Mr Green because the Employment Tribunal also anticipated that Mr Howe would not conclude his cross-examination of the Claimant within two hours either. The Employment Tribunal therefore considered that the Claimant's proposal was unsatisfactory.

16. Mr Howe suggested that the evidence of Mr Green be given first and the Tribunal agreed this would be the best solution and had read all the witness statements and had the benefit of reading the Claimant's full account of events consisting of 41 pages. The Tribunal considered that to the extent that either party could be disadvantaged by the interposition of Mr Green prior to cross examination of the Claimant it would be the Respondent rather than the Claimant and the Respondent through Mr Howe consented to that proposal.

17. As the parties could not agree as to the order of witnesses the Tribunal decided, using its powers under rule 60 to regulate its own procedure, determined to hear Mr Green's evidence first and before cross examination of the Claimant. The Employment Tribunal considered that hearing Mr Green's evidence first would help ensure the parties were on an equal footing since the Claimant would not be disadvantaged by the pressure of time as a litigant in person to finish cross examination within a couple of hours, she would not have to undertake cross examination

of a witness when her own cross examination may not have been complete. The Employment Tribunal considered that its decision was in accordance with the overriding objective and would ensure a just hearing.

18. The Claimant sought a short adjournment and her brother explained that they were unhappy with the decision. The Tribunal accordingly adjourned for a short while but when the Claimant returned she asked that the hearing be adjourned and re-listed on a future occasion. She explained that in her opinion it was not in her interests or the interests of the Respondent for Mr Green's cross examination to be first and she did not want the time pressure which she considered would be detrimental to the presentation of her case. The Respondent opposed the request for an adjournment on grounds, inter alia, that there had been two previous postponements and that there would be ample time for cross examination of Mr Green that day; the Employment Tribunal noted that the time was then approximately 11.10 am.

19. The Claimant went on to repeat her concerns and said that she was concerned about the impartiality of the Tribunal. The Tribunal asked if she would like to set out her concerns so the Tribunal could consider if it had been biased or given the appearance of bias, to comment on the concerns. The Claimant declined to do so. She said she and her brother did not want to discuss their concerns about impartiality and said they would rather write a letter. The Tribunal explained its preference to hear the concerns so that they could be considered and invited Ms Papajak and her brother to provide details; again they refused and the Employment Tribunal refused to agree to an adjournment. Its reasons were there was ample time for cross-examination of Mr Green on all matters relevant to the proceedings. When the case was originally lodged it was assessed as being appropriate for a one day hearing at a Case Management Discussion but having regard to the complexity of the issues of the disputed facts it should have been accurate time estimate. When the case came for hearing before

Employment Judge Hall-Smith it was considered neither was ready and the case had expanded somewhat in scope. The hearing was postponed and a, "generous" time estimate of three days for the evidence and submissions and one day for chambers deliberation was allocated. The Employment Tribunal noted Mr Green no longer worked for the Respondent and had made arrangements to attend that day on 31 August 2010 for cross examination. The Employment Tribunal concluded there was no detriment or "disbenefit" to the Claimant in Mr Green's cross examination taking place before her own cross examination because the Employment Tribunal had pre-read the witness statements. If anyone were to be disadvantaged it would be the Respondent and Mr Green since they would not have the benefit of hearing the Claimant's evidence and her allegations before providing his account, but conversely the Claimant would have had the benefit of cross examining Mr Green before giving her account and Mr Green would not be able to further respond. The Employment Tribunal concluded that a postponement would result in additional delay and would not be in accordance with the overriding objective to deal with cases expeditiously.

20. The Employment Tribunal record that the Claimant and her brother expressed their dissatisfaction with the decision and indicated an intention to leave. It is important to set out in full paragraphs 27 and 28 of the decision of the Employment Tribunal:

> **"27. The Tribunal explained the likely consequences of a departure by them since the burden of proof lay on the Claimant for every cause of action before the Tribunal and in light of the extensive dispute of fact we would need her to give evidence to succeed in her claim. She needed to establish the dismissal for the purposes of the constructive dismissal claim; she needed to prove the terms and the entitlement to commission in the breach of contract/unlawful deductions claim; she needed to establish that proceedings against Zenosis Limited had been brought in time or that the Tribunal should extend time so as to confer jurisdiction on what would otherwise be a late complaint; it was for her to establish that the transfer of assets from Zenosis Limited to Intellego Holdings Limited was a TUPE transfer; and, finally it was for her to establish that the Respondent had failed to provide a section 1 statement of terms, or prove the inaccuracy of the contract in the bundle. We explained that if she were to leave the Tribunal without giving evidence it would be fatal to the success of her claims.**
>
> **28. Ms Papajak confirmed she understood what would be likely to happen if she and her brother were to leave now."**

21. The Tribunal offered the Claimant a short break to consider the matter but she explained that she did not have wish to a have short break because her view would not change and she wished to leave without offering any evidence. After Ms Papajak and her brother had left the case proceeded in their absence. The Employment Tribunal (which had already had the benefit of reading the witness statements and documents referred to, although none of the witnesses had taken the oath) considered the claim form and response and further and better particulars submitted by both parties. It was clear to the Employment Tribunal there was a considerable dispute as to the facts between the parties and in each cause of action the burden of proof lay on the Claimant. In the absence of the Claimant and in the absence of her evidence, the Tribunal was not satisfied her claim was well founded and the case was therefore dismissed.

22. HHJ Birtles permitted three grounds to go forward to a full hearing and these are the grounds therefore, that we have considered.

> **"Ground 1: The Tribunal erred in law by deciding that it was "practicable" (Rule 35(3)) for the original Employment Judge to determine the preliminary consideration of the application to review despite the fact that the application included concerns about bias (which the Employment Judge herself concluded would be inappropriate for her to determine as part of the review).**
>
> **Ground 2: The Tribunal erred in law by deciding that an application for review involving issues of bias, under the general heading of "interests of justice", was not appropriate for the review mechanism, when there is no such limitation in the wording of rule 34(3)(e).**
>
> **Ground 3: The Tribunal erred in law by repeating the same substantive errors made at the hearing (a) by considering an erroneous factor in exercising its discretion to dismiss the claim, namely the "absence of her [the Claimant's] evidence" when the Claimant had produced evidence and the Tribunal had read the Claimant's signed statement and referenced documents and/or (b) by failing to consider a relevant factor, namely the Claimant's witness statement and referenced documents as "evidence" in order to properly consider the "information in its possession which has been made available to it by the parties" (Rule 27(6)) before deciding to dismiss the claim."**

23. We now turn to the Claimant's submissions.

Ground 1

24. It was submitted to us that Employment Judge Stacey was wrong to have determined that rule 35(3) of the Employment Tribunal Rules of Procedure was applicable; she submitted that the applicable rule was rule 9. We will refer to these rules later. She also submitted that Employment Judge Stacey was wrong to say during the course of the hearing that the Claimant did not know who the proper Respondent was. The Claimant maintained that she was aware and had written to the Employment Tribunal with that information.

25. The Claimant maintained that justice had to be seen to be done.

26. We observe that it was difficult to understand what precisely the Claimant was submitting. She made it clear that she was not alleging bias as a ground of appeal although she did still assert that Employment Judge should have been replaced or should have recused herself in the interests of justice. It is difficult to understand what the bias asserted against Employment Judge Stacey might have been. The only criticism which the Claimant has of Judge Stacey is in effect taking decisions with which the Claimant did not agree although she did say the Judge appeared to favour the Respondent.

27. The rules did require the Judge of the Tribunal that made the decision subject to the review, to conduct preliminary consideration of the application unless that was "not practicable" in which case the Regional Employment Judge or Vice President should do so. It was submitted by the Claimant that practicability is not limited to the question of whether it is physically possible for the Employment Judge who heard the case to consider the review application, but applies to cases such as the instant case where an assertion of bias is made against the Employment Judge. Employment Judge Stacey had observed a rule that provided for the Employment Judge to review his or her own decision did not lend itself well to an

allegation of bias and impartiality as the complainant would have no confidence in the decision if the review request were not granted. She had said that complaints of bias were not appropriate for the review mechanism at all but were better dealt with by way of appeal. It is submitted that instead the Employment Judge should have concluded that by reason of the allegation of bias it was not, "practicable" for her to consider the application for review which should have been considered by another Employment Judge.

Ground 3

28. The Claimant submits that the Employment Tribunal was bound to consider the case on its merits; there was no requirement that she should be present to give evidence and was permitted to rely upon written evidence submitted to the Tribunal. Accordingly, there was no justification for the Employment Tribunal to have said that in the absence of the Claimant's evidence the Tribunal was not satisfied that the claim was well founded but it was submitted the Employment Tribunal should have considered all of the evidence before coming to that conclusion.

29. It is unfortunate that allegations of bias are bandied about too frequently without adequate consideration of what might constitute bias. In this regard it is helpful to refer to the judgment of Rimer J in **London Borough of Hackney v Sagnia** [2005] UKEAT/0600/03.

30. We must approach decisions of Employment Tribunals without the nitpicking of subjecting them to an unduly critical analysis. The matter was put succinctly by Lord Hope in **Hewage v Grampian Health Board** [2012] ICR 1054:

> **"26. It is well established, and has been said many times, that one ought not to take too technical a view of the way an employment tribunal expresses itself, that a generous interpretation ought to be given to its reasoning and that it ought not to be subjected to an unduly critical analysis."**

31. We need to make it clear as well insofar as the exercise of discretion by the Employment Judge is concerned that the party asserting that an exercise of discretion is flawed must show that the Employment Judge went outside the generous ambit of his discretion. It is also the case that the courts should be slow to allow appeals against case management decisions, especially as courts and Tribunals are now encouraged to take robust case management decisions to give effect to the overriding objective.

32. We refer to the decision of Wall LJ in **Canadian Imperial Bank of Commerce v Beck** [2009] IRLR 740:

> **"23. As to the correction of an error of law committed by a judge who is exercising a judicial discretion, the law is equally clear. The leading case is *G v. G* [1985] 1 WLR 647, which contains references to the well-known judgment of Asquith LJ in *Bellenden (formerly Satterthwaite) v Satterthwaite* [1948] 1 All ER 343 at 345. For an appeal to succeed, the exercise of discretion which is challenged must, in Asquith LJ's words: "exceed the generous ambit within which reasonable disagreement is possible".**
>
> **24. There is no particular magic in the fact that we are here dealing with an appeal from the ET to the EAT and then to this Court. *G v G* principles apply in the instant case as they would apply to any other appeal which involves the exercise of a judicial discretion."**

33. To the same effect is the judgment of Longmore LJ in **Chief Constable of Lincolnshire Police v Caston** [2010] IRLR 327:

> **"I agree and would only reiterate the importance that should be attached to the EJ's discretion. Appeals to the EAT should be rare; appeals to this court from a refusal to set aside the decision of the EJ should be rarer. Allowing such appeals should be rarer still."**

34. We have also derived assistance in relation to case management decisions to the decision in **Gayle v Sandwell & West Birmingham Hospitals NHS Trust** [2011] IRLR 810. Mummery LJ observed at 21:

> **"Eighthly, the ETs continue to make good progress in managing cases efficiently and justly to ensure that the oral hearing concentrates on what really matters without wasting time and money on what does not matter or is only marginally relevant. If the ETs are firm and fair in**

their management of cases pre-hearing and in the conduct of the hearing the EAT and this court should, wherever legally possible, back up their case management decisions and rulings."

35. We would also point out that the relevant Employment Appeal Tribunal practice direction at the time we heard this appeal 200811.6.2 noted that:

"The EAT recognises that employment judges and Employment Tribunals are themselves obliged to observe the overriding objective and are given wide powers and duties of case management (see Employment Tribunal (Constitution and Rules of Procedure) Regulations 2004 (SI No 1861)), so appeals in respect of the conduct of Employment Tribunals, which is in exercise of those powers and duties, are the less likely to succeed."

36. This Tribunal is particularly reluctant to interfere in case managements of Employment Tribunals; see **X v Z Ltd** [1998] ICR 43 per Waite LJ at 54 CE:

"The case provides a salutary example of the value of the rule that the tribunals themselves are the best judges of the case management decisions which crop up every day as they perform the function, an important but seldom an easy one, of trying to do justice with the maximum of flexibility and the minimum of formality to the problems that arise from the employment relationship and its termination. Decisions of the kind that the chairman was required to make in this case frequently call for a balance to be struck between considerations of time, cost and convenience as well as fairness to the parties, and in the vast majority of cases can and should be left to the tribunals to resolve for themselves without interruption from the appellate process."

37. We remind ourselves that the rest for apparent bias is whether a fair minded and informed observer having considered the facts would conclude that there was a real possibility that the Tribunal was biased, i.e. treated one party less favourably and unfairly: **Porter v Magill** [2002] 2 AC 357 at paragraph 103 per Lord Hope.

38. We now need to turn to certain of the Employment Tribunal Rules of Procedure. Rule 9 of 2004 Rules of Procedure provided as follows:

"(1) Where proceedings are to be determined by a Tribunal comprising an Employment Judge and two other members, the President, Vice President or a Regional Employment Judge shall select—

(a) an Employment Judge; and

(b) one member from each of the panels referred to in regulation 8(2)(b) and (c), and for all other proceedings shall select an Employment Judge."

39. Rule 27 provided, "What Happens at the Hearing". The rule provides that a party is entitled to give evidence, call witnesses and question witnesses. However, rule 27(5) provided as follows:

"5. If a party fails to attend or to be represented (for the purpose of conducting the party's case the hearing) at the time and place fixed for the Hearing, the Tribunal may dismiss or dispose of the proceedings in the absence of that party or may adjourn the hearing to a later date.

6. If the Tribunal wishes to dismiss or dispose of proceedings in the circumstances described in paragraph (5) it shall first consider any information in its possession which has been made available to it by the parties."

40. We set out the relevant portions of rules 34 of 35 of the Employment Tribunal Rules of Procedure:

"Review of other judgments and decisions

34

The grounds on which a decision may be reviewed are that:

(a) the decision was wrongly made as a result of an administrative error;

(b) a party did not receive notice of the proceedings leading to the decision;

(c) the decision was made in the absence of a party;

(d) new evidence has become available since the conclusion of the hearing to which the decision relates, provided that its existence could not have been reasonably known of or foreseen at that time; or

(e) the interests of justice require such a review (2004 Rules r 34(3)).

(f)

(g) Preliminary consideration of application for review

35

(3) The application to have a decision reviewed shall be considered (without the need to hold a hearing) by the [Employment Judge] of the tribunal which made the decision or, if that is not practicable, by —

(a)a Regional [Employment Judge] or the Vice President;"

Conclusions

41. Ground 1 and Ground 2 we have some difficulty in understanding the nature of the Claimant's case. The Claimant has not alleged and disavowed any intention of alleging bias on the part of Employment Judge Stacey, yet at the same time she maintains that she should effectively have recused herself. It is quite clear to us on the basis of the law as to bias as we have set out them out Employment Judge Stacey displayed no bias. The criticism made of her is that she made an order in exercise of her case management powers relating to the time when Mr Green should be cross examined. If we may so her order was clearly sensible and in accordance with the overriding objective.

42. Further, by virtue of rule 34 of the Employment Judge was correct in saying that the only basis upon which she could possibly consider a review was on the basis that the interests of justice required such a review, although the decision was made in the absence of the Claimant that was because of the Claimant's petulant conduct in electing to leave the Tribunal and not return, notwithstanding the adjurations of the Tribunal as recorded in its judgment.

43. It is clear to us that contrary to the Claimant's submission rule 9 which refers to the general power to allocate employment judges to cases is displaced in the special case of a review by rule 35. The term, "practicable" as set out in the rule is clearly intended to deal with cases where the original Employment Judge is physically unavailable or has died or very possibly is too unwell to attend to the application. There is obvious good sense that the Employment Judge who has dealt with the case and has a detailed knowledge of it should deal with an application for a review. Practicable does not mean "convenient" but "feasible". It was perfectly feasible for Employment Judge Stacey to consider the application.

44. Applications for a Judge to recuse himself on grounds of perceived bias are made frequently and Judges dispose of such applications on a regular basis. We are unable to see how the fact that an assertion of bias (especially one that is wholly devoid of merit) renders it impracticable for that Employment Judge to consider the application. Were to be otherwise it would always be possible to prevent a particular Judge from hearing the application simply by making an unfounded allegation of bias.

45. It should be also noted that the Employment Judge was one of a panel of three. There is no suggestion that her lay members were biased.

46. It should be borne in mind that the decision made by Employment Judge Stacey in relation to Mr Green was, as we have said, a case management decision in the exercise of her discretion and one that was entirely sensible. It is impossible to show that the decision was in any sense outside the scope of her discretion and I see no basis at all for asserting that she manifested any bias.

Ground 3

47. It is apparent to us on the submissions made by the Claimant that she believed that the review procedure was an opportunity for a complete rerun of the proceedings. It is, of course, no such thing and grounds upon which a judgment can be reviewed are set out in rule 34 which we have set out above. Having deliberately chosen, despite adjurations by the Employment Tribunal, the Claimant and her brother chose not to participate further in the proceedings, there is no proper basis upon which she may seek a review on the grounds that the decision was made in her absence. A review is not a substitute for an appeal. The mere fact that the Claimant was asserting there had been bias supports the decision of the Employment Judge such an allegation was more appropriate for an appeal, and was a ground in itself for Employment Judge Stacey to

decline to direct a review. The Claimant still had her remedy of appeal in relation to the allegation of bias which was in any event wholly without merit and which has been rejected by the Employment Tribunal Appeal. The Court of Appeal refused permission to appeal against that decision. I also note that it would be undesirable if one Employment Judge were to have to consider an allegation of bias against a fellow Employment Judge – the correct course to appeal.

48. When the Claimant and her brother chose to leave the proceedings the Employment Tribunal had wide case management powers to determine how to proceed; see rule 10. When the Claimant and her brother left the proceedings the Tribunal was entitled under rule 27(5) to dismiss or dispose of the proceedings in the absence of the Claimant; before doing so it was required to, "consider any information in its possession which has been made available to it by the parties". The Employment Tribunal had done just that. The Employment Tribunal, having considered the claim, response, further and better particulars and had read all the witness statements (including the 41 page witness statement produced by the Claimant) and was entitled to dispose of or dismiss the case. The Employment Tribunal, having read that material, was perfectly entitled to conclude there was a considerable dispute of facts between the parties and in each cause of action the burden of proof lay on the Claimant. The Employment Tribunal was accordingly entitled to conclude also that by reason of the Claimant's refusal to give evidence that her claim was not well founded.

49. It is said that the Employment Tribunal misdirected itself by in effect saying that by reason of the Claimant's refusal to give evidence it was unnecessary for the Employment Tribunal to consider the merits of the case. The Claimant maintains that at the least the Employment Tribunal should have considered the Claimant's evidence. She maintains it did not. We are unable to accept the Claimant's assertion in the light of the clear statements by the

Employment Tribunal that it had considered the evidence. In those circumstances, as we have observed, it was fully entitled to come to the conclusion that it did.

50. Its decision to make an order in the way it did was, in our opinion, well within the scope of its discretion. The Claimant can have no doubt as to why judgment was given against her; namely because the burden of proof lay upon her in establishing her case based on evidence that was disputed and she declined or refused to give that evidence. Her evidence was hearsay, in the absence of her entering the witness box, and although the Employment Tribunal clearly had jurisdiction to accept hearsay evidence it is nonetheless not able to ignore or totally disregard well established principles of law with reference to the admissibility of evidence and the weight to be attached to hearsay evidence. The Employment Tribunal was accordingly entitled to have regard to the fact that the Claimant's witness statement was hearsay and would attract much less weight than if she had gone into the witness box to give oral evidence; see **Snowball v Gardiner Merchant** [1987] ICR 719, Sir Ralph Kilmer-Brown (EAT).

51. For these reasons the appeal must be dismissed.